(5)

NO. 86-357

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC.
et al.,

Appellants,

v.

JAMES I. SCHEINER,
SECRETARY OF THE DEPARTMENT OF REVENUE,
et al.,

Appellees.

On Appeal from the Supreme Court
of Pennsylvania

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE, IN SUPPORT OF APPELLANTS

MICHAEL C. TURPEN *
ATTORNEY GENERAL OF OKLAHOMA

RICHARD MILDREN
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR STATE OF OKLAHOMA
AMICUS CURIAE

* Counsel of Record

December, 1986

NO. 86-357

IN THE

SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC.
et al.,

Appellants,

v.

JAMES I. SCHEINER,
SECRETARY OF THE DEPARTMENT OF REVENUE,
et al.,

Appellees.

On Appeal from the Supreme Court
of Pennsylvania

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE, IN SUPPORT OF APPELLANTS

MICHAEL C. TURPEN *
ATTORNEY GENERAL OF OKLAHOMA

RICHARD MILDREN
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR STATE OF OKLAHOMA
AMICUS CURIAE

* Counsel of Record

December, 1986

TABLE OF CONTENTS

	Page
Interest of the Amicus	1
Statement	4
A. Oklahoma's Trucking Industry.	4
B. Oklahoma's Highway Tax System	5
Summary of the Argument	7
ARGUMENT	10
A. The Pennsylvania Axle Tax's Structural Discrimination Against Out-of-State Trucks Cannot Be Justified Under the Compensatory Tax Doctrine . .	10
B. The Challenged Taxes Discriminate Against Interstate Commerce in Their Actual Effect Because They Are Not Proportioned to the Level of Highway Use.	12
C. Oklahoma Has Adopted "Mirror" Taxes to Protect Its Truckers From the Competitive Disadvantage Caused by the Challenged Taxes	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

Cases Cited

American Trucking Associations, Inc. v. Gray, 707 S.W.2d 759, 763 (Ark. 1986) 15

American Trucking Associations, Inc. v. Gray, 55 U.S.L.W. 3175 U.S. appeal docketed Sept. 3, 1986, No. 86-358 2,9

American Trucking Associations, Inc. v. Quinn, 437 A.2d 623 (Me. 1981) 12

American Trucking Associations, Inc. v. Scheiner, 509 A.2d 838, 852, 855 (Pa. 1986) 10,14

Best & Co. v. Maxwell, 311 U.S. 454 (1940) 15

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 15

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 69 (1963) 17

Maryland v. Louisiana, 451 U.S. 725 (1981) 15

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) 10

Private Truck Council of America, Inc. v. New Hampshire, No. 86-088 (N.H. Aug. 12, 1986) 12

Statutes Cited

47 O.S.Supp.1985, § 1120(k) 17,18

47 O.S.Supp.1985, § 1133 6

68 O.S.Supp.1985, § 502 6,7

68 O.S.Supp.1985, § 516 6,7

68 O.S.Supp.1985, § 520 6,7

68 O.S.Supp.1985, § 524 6,7

68 O.S.Supp.1985, § 603 6,7

68 O.S.Supp.1985, § 604 6,7

Other Authority Cited

Sup.Ct.R. 36 1

Associated Motor Carriers of Oklahoma, Inc., Oklahoma's Trucking Industry (1986) 4

Rand McNally & Company, 1981 Commercial Atlas & Marketing Guide, 436-439 4

U. S. Department of Commerce, 1977 Census of Transportation, Commodity Transportation Survey, Table 1 5

H. C. Resolution No. 1001, May 3, 1983 18

U.S. Const. art. I, § 8 20

NO. 86-357

IN THE

SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC. et al.,

Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, et al.,

Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of this Court, the State of Oklahoma, by its undersigned Attorney General, respectfully submits this brief as amicus curiae in support of appellants.

INTEREST OF THE AMICUS

This appeal turns on whether a state statute violates the Commerce Clause of

the United States Constitution if it imposes a highway tax that, in its practical application, falls more heavily (if not exclusively) on trucks registered outside the taxing state than on trucks registered in the state. The challenged taxes -- Pennsylvania's annual $36-per-axle tax and former $25-per-truck marker fee -- discriminate against interstate commerce in just this mannter. So does Arkansas' annual $175-per-truck highway use equalization ("HUE") tax, which is the subject of a related appeal (American Trucking Associations, Inc. v. Gray, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358)). Similar non-proportional truck taxes in Indiana, Kentucky, Maryland, New Jersey, and Vermont likewise result in discrimination against out-of-state motor carriers.

Oklahoma motor carriers are victims of these discriminatory highway taxes. Compelled to shoulder a disproportionate

share of Pennsylvania's and the other discriminating states' highway costs, Oklahoma-based truckers suffer inflates costs, reduced productivity, and are at a competitive disadvantage to truckers within such states with discriminatory taxes. The resulting decline in Oklahoma's trucking industry leads to reduced employment. Thus, the State of Oklahoma has an interest in protecting its carriers and their employees from other states' discriminatory taxes. Oklahoma also has an interest in the maintenance of the free flow of interstate commerce, so as to ensure that a competitive, efficient interstate trucking industry is available both to deliver other states' products to Oklahoma's communities and to transport Oklahoma's products to out-of-state markets. In sum, the State of Oklahoma has a direct and substantial interest in this appeal.

STATEMENT

A. Oklahoma's Trucking Industry

Oklahoma's trucking industry comprises thousands of motor carrier companies that operate tens of thousands of trucks. Approximately 33,768 trucks, in excess of 26,000 lbs., base-registered in Oklahoma are involved in interstate commerce.[1] Nearly 100,000 Oklahomans are employed in trucking-related jobs, with an annual payroll of over $1.5 billion. Associated Motor Carriers of Oklahoma, Inc., Oklahoma's Trucking Industry (1986). The trucking industry serves every Oklahoma community, and 62% of Oklahoma's communities depend entirely on trucks to ship and receive goods. Rand McNally & Company, 1981 Commercial Atlas & Marketing Guide, 436-439. All of Oklahoma's industries rely heavily on trucking to transport their products,

---

[1] In 1985, 33,768 vehicles in excess of 26,000 lbs. were registered pursuant to the apportioned registration provisions of 47 O.S.Supp.1985, § 1120.

with nearly 75% of commodity transportation (excluding pipelines) by truck. U.S. Department of Commerce, 1977 Census of Transportation, Commodity Transportation Survey, Table 1. Some businesses, such as natural resource producers of many products (e.g., stone and clay), and farmers producing and selling fresh fruits and vegetbles, rely almost exclusively on truck transportation.

Oklahoma's trucking industry is thus a vital part of the state's economy. It directly impacts virtually every other business enterprise in the state, and affects the daily lives of every Oklahoman.

B. Oklahoma's Highway Tax System

The State of Oklahoma has imposed on trucks two non-discriminatory forms of highway tax. The funds raised from such taxes are used to build and maintain nearly 12,000 miles of Oklahoma highways. One tax is an annual truck registration

fee, graduated according to weight. 47 O.S.Supp.1985, § 1133. The other tax is on the purchasing and use of fuel by trucks. 68 O.S.Supp.1985, §§ 502, 516, 520, 524, 603 and 604.

As a member of the International Registration Plan (hereinafter known as "IRP"), Oklahoma charges interstate trucks from other IRP states only a percentage of its usual registration fee. This percentage is based on the ratio of the truck's total miles traveled nationwide to its miles traveled in Oklahoma. Trucks registered in non-IRP states operate in Oklahoma without paying the Oklahoma registration fee because of reciprocity agreements between Oklahoma and those states. Such reciprocity agreements permit Oklahoma-registered trucks to use the highways in these other states. Under both the IRP and reciprocity agreements, interstate trucks avoid the discriminatory burdens imposed by the

Pennsylvania axle tax and similar state taxes that favor locally based trucks.

Oklahoma's second form of highway taxation is on a truck's purchase and use of fuel. 68 O.S.Supp.1985, §§ 502, 516, 520, 524, 603 and 604. Oklahoma taxes all fuel purchased in the state and all fuel used, but purchased outside the state. This tax is non-discriminatory in its operation.

SUMMARY OF ARGUMENT

The challenged Pennsylvania highway taxes discriminate against interstate commerce in two ways. First, the annual $36-per-axle tax scheme represents a form of "structural discrimination." While technically imposing the tax on all trucks, the Pennsylvania legislature simultaneously reduced in-state truck registration fees by amounts equal to the tax, thereby effectively exempting Pennsylvania based trucks from its impact.

Second, both the axle tax and Pennsylvania's $25-per-truck marker fee work an "effective discrimination" against interstate commerce. Due to its non-proportional measure, each tax imposes a far higher effective tax cost per mile on out-of-state trucks than Pennsylvania based trucks. A truck based in Oklahoma faced a substantial economic disadvantage, discriminatory in nature, to trucks registered in states such as Pennsylvania and Arkansas that impose taxes non-proportional to use when using the highways of those states.

Both forms of discrimination against out-of-state trucks, including those registered in Oklahoma, increase their costs, reduce their efficiency, and place them at a significant competitive disadvantage. That disadvantage has worsened as nonproportional highway taxes have spread to Arkansas (see, American Trucking Associations, Inc. v. Gray, 55

U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358)) and five other states (id. at 2 & 16). The resulting cumulative tax burden on interstate trucking has far reaching consequences for the economies of those states, including Oklahoma, that rely on a strong, competitive trucking industry.

In this appeal, the Court has the opportunity to declare unconstitutional all forms of state highway tax discrimination, and to require states to use nondiscriminatory taxes to recover their highway costs. Oklahoma's own successful reliance on apportioned/reciporcal truck registration fees and mileage-related motor fuel taxes shows that nondiscriminatory forms of state highway taxation are readily available. Thus, Pennsylvania and Arkansas could satisfy their highway tax needs in a nondiscriminatory and far less burdensome manner as preferred by this Court. See,

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

ARGUMENT

A. The Pennsylvania Axle Tax's Structural Discrimination Against Out-of-State Trucks Cannot Be Justified Under the Compensatory Tax Doctrine.

Pennsylvania's axle tax statute protected Pennsylvania-registered trucks from the impact of the tax by simultaneously reducing in-state truck registration fees by amounts equal to the tax. The Pennsylvania Supreme Court erroneously approved this protection of in-state taxpayers as an appropriate way, under this Court's "compensatory" tax doctrine, to "neutralize or partially offset an economic advantage previously enjoyed by interstate commerce . . ." American Trucking Associations v. Scheiner, 509 A.2d 838, 855 (Pa. 1986). Such an "economic advantage" existed because, the state supreme court supposed, only trucks based in

Pennsylvania are required to pay Pennsylvania's annual truck registration fee.

The court's supposition was incorrect. Pennsylvania's registration fee, like Oklahoma's, in fact is imposed directly or indirectly on all trucks that use its highways, whether or not based in the state. Under the IRP (supra at 6), to which Pennsylvania belongs, all trucks -- regardless of their base state of registration -- must pay a portion of the registration fee of each state in which they operate, the portion to be determined by the percentage of the truck's total miles nationwide that it travels in the state. Likewise, under reciprocity arrangements between Pennsylvania and other states (supra at 6), out-of-state vehicles indirectly pay Pennsylvania a registration fee. As the Maine Supreme Judicial Court correctly found in striking down a discriminatory

highway tax of that state as violative of the Commerce Clause:

> [I]n a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.

American Trucking Associations, Inc. v. Quinn, 437 A.2d 623, 627 (Me. 1981). Accord, Private Truck Council of America, Inc. v. New Hampshire, No. 86-088 (N.H. Aug. 12, 1986).

Pennsylvania's registration fee thus is not "compensatory" to the axle tax and therefore cannot be viewed as offsetting the clear structural discrimination created by the axle tax scheme. The inescapable reality is that Oklahoma-registered trucks, like trucks from all other states, are forced to shoulder the axle tax while Pennsylvania trucks are not.

B. The Challenged Taxes Discriminate Against Interstate Commerce in Their Actual Effect Because They Are Not Proportioned to the Level of Highway Use.

The challenged taxes are causing two significant problems. They place a higher cost per mile on Oklahomma-based truckers placing them at a substantial competitive disadvantage. Also, the non-proportioned taxes, like the ones challenged in this appeal plus the ones challenged in the contemporaneous Gray appeal, impose a cumulative tax burden.

The Pennsylvania axle tax, as well as the Pennsylvania marker fee and the Arkansas HUE tax (at issue in the contemporaneous Gray appeal), work an effective discrimination against interstate commerce in their actual operation. Each tax, though facially neutral, operates to disadvantage out-of-state trucks because its incidence is not proportional to highway use. In-state trucks generally

use their own state's highways much more than trucks from other states do. By paying the same amount for much higher usage levels, locally-based trucks enjoy substantially lower per-mile tax costs than their out-of-state counterparts. Taxes such as those at issue in this case are imposed to reimburse the state for highway wear and tear, which is most directly attributable to the level of vehicle mileage. Therefore, a tax that levies a higher effective per-mile tax rate on out-of-state trucks plainly discriminates against interstate commerce.

The Pennsylvania Supreme Court recognizes that "a flat tax imposed upon all commerce may have a greater impact upon interstate commerce if such commerce actually uses the state's services or facilities less than local businesses." American Trucking Associations, supra, at 852. Similarly, the Arkansas Supreme

Court in Gray assumed for the sake of argument that "on a cost per mile basis, out of state truckers are charged more" under the HUE tax American Trucking Associations, Inc. v. Gray, 707 S.W.2d 759, 763 (Ark. 1986). Both courts, however, held that this type of discrimination is permissible.

Oklahoma submits that the decisions of the Pennsylvania and Arkansas Supreme Courts are directly contrary to this Court's well established approach of examining the practical effects of state taxes challenged under the Commerce Clause. Best & Co. v. Maxwell, 311 U.S. 454, 456 (1940); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616 (1981); Maryland v. Louisiana, 451 U.S. 725, 756 (1981).

The practical effect of the taxes challenged in this appeal and Gray is a per-mile discrimination that places Oklahoma truckers at a substantial dis-

advantage in competing with Pennsylvania and Arkansas based trucks. That competitive disadvantage first exhibits itself as an increased cost vis-a-vis locally based competitors on any transportation operation involving a Pennsylvania or Arkansas movement. Those increased costs later become reduced profits. Oklahoma trucking companies find it harder to expand, make capital investments, improve their efficiency, and operate successfully in the highly competitive trucking market. As Oklahoma's trucking industry suffers, its contribution to Oklahoma's economy also declines, thereby harming the state's other interstate industries.

In addition to the first problem, flat, non-mileage proportioned taxation of interstate trucking has recently spread from Pennsylvania and Arkansas to five other states. Indiana ($50 per truck), Kentucky ($150 per truck),

Maryland ($25 per truck), New Jersey ($25 per truck), and Vermont ($50 per truck) all impose taxes that, while facially neutral, impose higher effective tax costs per mile on out-of-state trucks than in-state trucks. As a result, Oklahoma truckers face a growing cumulative tax burden totally unrelated to the extent of their use of the various states' highways. If this Court upholds the Pennsylvania taxes, similar taxes will likely be adopted by other states, with even more deleterious effects on the free flow of interstate commerce. See Halliburton Oil Well Cementing Company v. Reily, 373 U.S. 69, 72 (1963).

C. Oklahoma Has Adopted "Mirror" Taxes to Protect Its Truckers From the Competitive Disadvantages Caused by the Challenged Taxes.

Oklahoma has attempted to stim these adverse consequences and protect its truckers by enacting "mirror" taxes. 47 O.S.Supp.1985, § 1120(k). The Oklahoma

Tax Commission has the authority to examine other states' taxation of Oklahoma-registered trucks and, if necessary, impose an identical "mirror" tax on the Oklahoma operations of trucks registered in that state. Such authority was given to the Tax Commission to protect Oklahoma truckers from being at an "economic disadvantage" to truckers in states that enact such taxes as the ones challenged in this case and the Gray appeal. H.C. Resolution No. 1001, May 3, 1983.

It was the intention of the legislature in enacting these statutory provisions to have fees of non-Oklahoma-registered trucks comparable to the fees assessed against Oklahoma-registered trucks. This scheme would "provide for uniform treatment of Oklahoma residents operating vehicles in other states and for residents of other states operating in Oklahoma." 47 O.S.Supp.1985, § 1120(k).

Using its discretionary power, the Oklahoma Tax Commission has imposed "taxes" to mirror both Pennsylvania and Arkansas taxes. If and when Pennsylvania or Arkansas eliminates its discriminatory tax on Oklahoma truckers, Oklahoma will cease assessing its mirror tax.

Clearly, the enacting of these challenged taxes of Pennsylvania and Arkansas is forcing other states to adopt legislation to protect its residents. By striking down these challenged taxes, this Court has the opportunity to end the necessity of such action by other state legislatures.

CONCLUSION

Oklahoma fully supports every State's right to assess and collect sufficient highway taxes to meet its own specific highway needs and cost. Indeed, Oklahoma recognizes that it is the responsibility of a state legislature to collect highway taxes to maintain a quality highway

system. Oklahoma disagrees only with the discriminatory form of the challenged taxes. Both Arkansas and Pennsylvania have manipulated their taxes to fall most heavily on those who have no voting representation within the state -- out of state truckers.

For all of the above reasons, the decision of the Pennsylvania Supreme Court should be reversed, and the Pennsylvania axle tax and marker fee should be declared unconstitutional under the Commerce Clause of the United States Constitution.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF
OKLAHOMA

RICHARD MILDREN
ASSISTANT ATTORNEY
GENERAL
ATTORNEYS FOR THE STATE
OF OKLAHOMA
AMICUS CURIAE